IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 443 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

VIDYUTKUMAR HIMATLAL PATEL - Appellant(s)
Versus
MANEKLAL AMBALAL BHAVSAR & 1 - Defendant(s)

==========

Appearance :

MR SS BELSARE for Appellant(s) : 1,
NOTICE SERVED for Defendant(s) : 1 - 2.

==========

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH
Date : 25/08/2006

ORAL JUDGMENT

Present Appeal has been filed by the appellant, original-plaintiff [hereinafter referred to as 'the plaintiff'] challenging the judgment and decree passed dated 25th January

1989 in Civil Suit No. 1931 of 1983 by the learned Judge, City Civil Court at Ahmedabad in dismissing the said Suit.

2. The plaintiff filed Civil Suit No. 1931 of 1981 in the City Civil Court at Ahmedabad against the defendants praying that the defendant No.1 be directed to accept from the plaintiff the sum of Rs. 4,500 and upon receipt of such sum from the plaintiff he be directed to reconvey possession of the suit property bearing Municipal Census No. 91/1/4, i.e., 1st floor and 2nd floor portions of the suit property bearing Survey No. 404 of Saraspur, Ahmedabad. It was averred in the Plaintiff that the suit property was admeasuring about 103 sq.yds., with different Municipal Census numbers. That out of the said suit property, a portion of the 1st and 2nd floors was given Municipal Census No. 91/1/4 consisting of two rooms. It was further alleged that formerly the defendant No.2 was the owner of the

entire suit property however as she was having some financial difficulties she borrowed a sum of Rs. 4,500 from defendant No.1 and in lieu thereof as a security gave possession of the rooms, i.e., 2 rooms bearing Municipal Census No. 91/1/4 to the defendant No.1. It was further contended that a writing to that effect was executed between the defendants No. 1 and 2 wherein it was mentioned that as and when defendant No.2 repay the sum of Rs. 4,500/- borrowed from 1st defendant the defendant No.1 should reconvey possession of the two rooms. It was further stated that original-writing is with the defendant No.1. It was further contended that thereafter on 1.11.1980 the defendant No.2 sold the entire suit property to the plaintiff and as such the plaintiff has since then become the absolute owner. It was further averred in the plaintiff that as he has become the owner of the suit property he approached the defendant No.1 representing that plaintiff is prepared to repay

him the loan of Rs. 4,500 taken from defendant No.1 by defendant No.2 and that thereupon the defendant No.2 should reconvey possession of the suit to the plaintiffs. It was further averred that the defendants did not comply with the request and hence the plaintiff served a notice upon him on 14.9.1981 and also to the defendant No.2. The defendant No.2 did not reply to the notice but the defendant No.1 replied to it on 12th October 1981 contending that the property in question is mortgaged to him and unless and until the mortgage is redeemed the plaintiff cannot claim any possession. As the possession was not handed over on payment of Rs. 4,500 the plaintiff filed the aforesaid suit. It was the contention on behalf of the plaintiff that thereafter the plaintiff gave one another notice to the defendant No.1 dated 3.2.1982 to which a further reply dated 23rd February 1982 was given by defendant No.1 contending that he is a sitting tenant and hence a protective title to the said

portion of the property. Therefore, the plaintiff filed the aforesaid suit for the aforesaid relief. It was contended on behalf of the plaintiff that the defendant No.1 is not a tenant in the portion of the suit property and therefore the plaintiff is entitled to recover possession from defendant No.1 as they are ready and willing to pay an amount of Rs. 4,500/- to the defendant No.1 which was required to be paid by the defendant No.1 and as per the writing the defendant No.1 was required to reconvey the possession.

3. The suit was resisted by the defendant No.1 by filing Written Statement at Exh.9. It was submitted that he had advanced Rs. 4,500/- to the defendant No.2, however the monthly rental of the premises was at Rs. 80 per month, and it was understood that the rental was to be adjusted towards the sum of Rs. 4,500 paid by him to the defendant No.2 and till the entire amount is

fully adjusted he had not to pay any rent. The defendant No.2 though served did not appear and therefore the suit against the defendant No.2 was ex-parte. The learned trial Court framed the issues at Exh. 14. Considering the writing Mark 30/4 which was not an original-writing, by holding that the same was not on a proper stamp; the same was inadmissible in evidence; and the suit was based upon the said writing only, the learned Judge, dismissed the said suit by further holding that on the basis of the said writing which is inadmissible in evidence for all purposes the plaintiff is not entitled to relief though the learned trial Court specifically observed that the defendant No.1 was not a tenant of the suit property and was not having a protective title to the suit property. Being aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court, the original-plaintiff has preferred the present First Appeal.

4. Shri S.S. Belsare, learned advocate appearing on behalf of the appellant, has vehemently submitted that the learned trial Court has materially erred in not passing the decree of possession though the learned trial Court has specifically held that the defendant No.1 has failed to prove that he was inducted as a tenant and that he had a protective title. It is submitted by him that when in the evidence the defendant No.1 has specifically admitted that Rs. 4,500 was paid by him to the defendant No.2 and the possession was handed over to him the learned trial Court ought to have held that possession was entitled to defendant No.1 by way of security for an amount of Rs. 4,500 paid by him to the defendant No.2 and therefore when there was a writing executed between the defendants that on payment of Rs. 4,500/- the possession will be reconveyed to defendant No.2 and when the plaintiff has subsequently purchased the suit property. The defendant No.1 was required to

reconvey possession to him on payment of Rs. 4,500 which was required to be paid by the defendant No.2 to the defendant No.1. However, the learned trial Court did not pass any decree and therefore it is requested to allow the present First Appeal. The learned advocate has relied upon the judgment of the Hon'ble Supreme Court in the case of *Bondar Singh and others v. Nihal Singh and others, AIR 2003 S.C. 1905* in support of his submission that it is not that the unregistered sale deed is not admissible in evidence for the purposes but it can be looked into for collateral purposes such as to see nature of possession of party over suit property.

5. Though served, nobody appears on behalf of the respondent, original-defendant. At the outset, it is required to be noted that the plaintiff filed the suit only relying upon agreement Mark/Exh. 30/4 and claiming his right to get possession of the suit property from the

defendant No.1 on payment of Rs. 4,500/- as per the said writing. It is required to be noted that though in the Plaint the plaintiff has averred that the original writing as per Exh. 30/4 is with the 1st defendant, what was produced with List at Exh.30/4 is only a copy and the plaintiff has not given any notice of production of that document to the defendant No.1 and in absence of the same the learned trial Court has not exhibited the said document at list at Mark/Exh.30/4. It is required to be noted that, though as per Section 59 of the Transfer of Property Act, when any charge is created in any immovable property exceeding sum of Rs. 100/- such writing needs compulsory registration, in the present case it was not shown that the document in question which was compulsorily registered has been registered with the registering authority. Under the circumstances, the learned Trial Judge has rightly held that the said writing which is produced with the list

Exh.30/4 is inadmissible in evidence for all purposes and the plaintiff is not entitled to any relief on the basis of the said writing which is inadmissible in evidence for all purposes. As stated above, the suit of the plaintiff was based only upon the said writing a copy of which was produced along with list at Exh.30/4 and the suit of the plaintiff was not based upon the fact that he has purchased the suit property and that the defendant No.1 is a trespasser and/or has no right to continue in the suit property. Under the circumstances, the learned trial Court has rightly declined to decree the suit which was based upon the writing, a copy of which was produced at list Exh. 30/4 by holding that the same was inadmissible in evidence for all purposes. In the facts and circumstances of the case, the learned trial Judge has not committed any error in dismissing the suit though the learned Judge has held that the defendant No.1 has failed to prove the tenancy of the suit

property and that he was having any protective title. The contention on behalf of the plaintiff that in the evidence it is submitted that Rs. 4,500 was paid by the defendant No.1 to defendant No.2 will lead nowhere. There is no admission on the part of the defendant No.1 that on getting back the amount of Rs. 4,500/- he was required to reconvey the possession to the defendant No.2. Merely because the defendant No.1 has admitted that he paid Rs. 4,500/- to the defendant No.2 the plaintiff cannot succeed on the basis of the writing produced along with List, Exh.30/4 as the same is not admitted by the defendant No.1. Under the circumstances, the submission on behalf of the appellant cannot be accepted. So far as the decision of the Hon'ble Supreme Court, relied upon by Shri Belsare, learned advocate appearing on behalf of the appellant is concerned, it is required to be noted that a judgment is required to be considered in the facts of each case. In the facts of the present case, as narrated

hereinabove, the judgment and the observation of the Hon'ble Supreme Court will not be of any assistance to the appellant. On going through the entire judgment and record of the proceedings of the suit, the learned Judge has not committed any error in dismissing the suit. This Court is in complete agreement with the reasoning and finding of the court below while dismissing the suit.

6. For the reasons stated above, the Appeal fails. It is dismissed. However, there will be no order as to costs.

[M.R. Shah, J.]

RMR.